OAH 68-9021-33387
Revisor R-4369

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules Relating to Issuance, Renewal and Validity of Teaching Licenses

ORDER REGARDING PRELIMINARY PROCEDURAL NONCOMPLIANCE

This matter came before Chief Administrative Law Judge Tammy L. Pust upon a motion of the Professional Educator Licensing and Standards Board (PELSB). The motion requested a determination that the PELSB could continue a rulemaking proceeding initiated by the Minnesota Board of Teaching (BoT).

Based upon a review of the PELSB's written submissions, and for the reasons discussed in the attached Memorandum of Law, the Chief Administrative Law Judge issues the following:

ORDER

1. To date, the PELSB has failed to comply with the requirements of Minn. Stat. § 14.101 (2016) due to its failure to publish a Request for Comments on or after January 1, 2018.

2. This noncompliance does not constitute harmless error pursuant to Minn. Stat. § 14.15, subd. 5 (2016).

3. As authorized by Minn. Stat. § 14.101, subd. 4, and for good cause shown, the required time period for the PELSB's soliciting comments from the public on the subject matter of the proposed rule shall be reduced from 60 days to 30 days.

Dated: February 18, 2018

TAMMY L. PUST
Chief Administrative Law Judge

MEMORANDUM OF LAW

Rulemaking 101

Minnesota's Administrative Procedures Act (the Act), Minn. Stat. ch. 14 (2016), sets forth the required steps of the rulemaking process. The Act provides many different rulemaking paths: adoption after a hearing; adoption without a hearing; expedited rulemaking; good faith exempt rulemaking; and more. Each path has unique, required procedural steps.

The present matter involves a rulemaking proceeding in which a state agency seeks to adopt rules after holding a public hearing. For this type of rulemaking, the Act requires the following actions:

1. The agency has or receives statutory **authority to adopt the rules** at issue;[1]

2. Within 60 days of obtaining this authority, the agency must **publish a Request for Comments** in the *State Register* and thereby notify the general public of its right to submit comments to the agency about the content of the proposed rules.[2]

3. After the passage of at least 60 days (or 30 days if so ordered by the Chief Administrative Law Judge) following the publication of the Request for Comments, the agency must **publish a Notice of Hearing** identifying when and where the hearing will be held, together with various other required filings.[3]

4. After the passage of at least 30 days following the publication of the Notice of Hearing, the **hearing is held** on the published date(s).[4]

5. After the hearing is completed, there is a mandatory 10-day[5] **post-hearing comment period** (5 days for the public to comment and 5 days for the agency to respond to comments).[6]

6. Within 30 days after the post-hearing comment period is completed, the administrative law judge must **issue a final report** either adopting or rejecting the proposed rules.[7]

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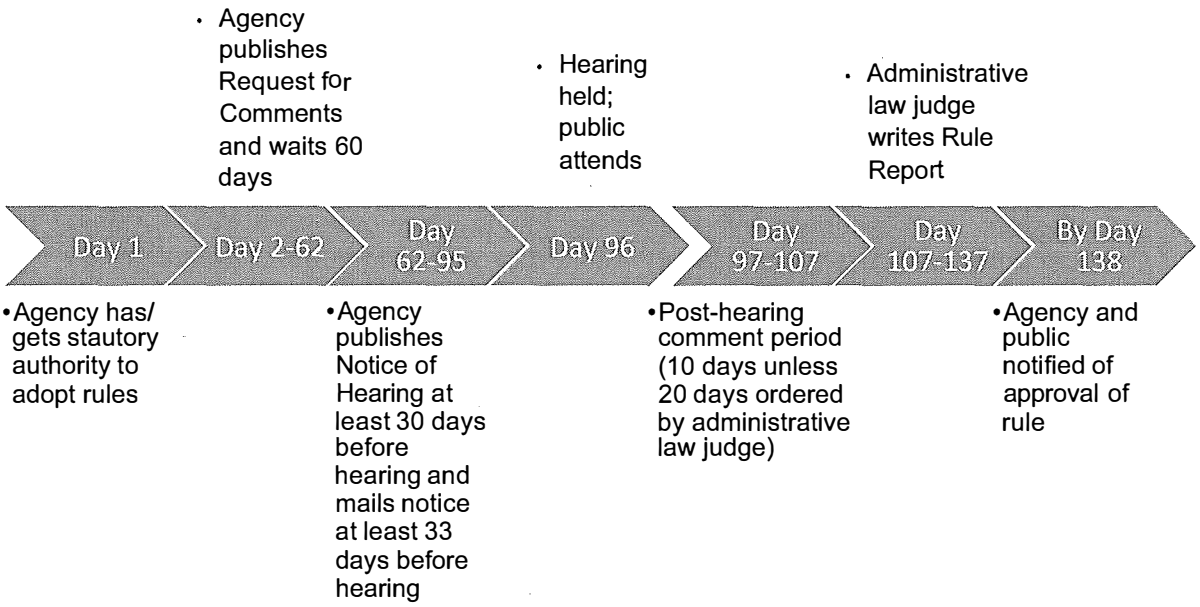
[1] Minn. Stat. § 14.05, subd. 1.
[2] Minn. Stat. § 14.101, subd. 1.
[3] Minn. Stat. § 14.101, subd. 4.
[4] Minn. Stat. § 14.14, subd. 1a.
[5] Minn. Stat. § 14.14, subd. 1.
[6] Minn. Stat. § 14.15, subd. 1.
[7] Minn. Stat. § 14.15, subd. 2.

Complying with these necessary statutory steps requires – at least – nearly five months of time,[8] as illustrated below.



The necessary preparation of the Statement of Need and Reasonableness (SONAR), drafting of the rule language, consideration of public input and, as appropriate, editing the proposed rule language in response to additional input, all require significant time and effort as well. While this work can be completed within the timeframes illustrated above for simple rules, completing this work for complex rule proceedings that involve major policy and process revisions can take much longer.

[8] Contrary to the agency's statement in this matter, even when a public hearing is required the statutory rulemaking process does not have to consume "over a year." [PELSB's Jurisdictional Submission, at 2.] Surely, if the agency has not drafted the rules before commencing the process, or if it takes the agency longer than 62 days to draft the SONAR which is required by the time the Notice of Hearing is published, the process may take longer than 138 days. But if and when the process does take longer than the timeline above indicates, it is the resource-allocation decisions of the agency and not the statutorily required timelines which drives that result. Best practice reveals that an agency's significantly completing the drafting work before publication of a Request for Comments not only streamlines the post-publication process, it maximizes the public's opportunity to participate in the proceeding. That result is foundational to the entire framework of the rulemaking process as designed by the Minnesota legislature. *See* Minn. Stat. § 14.001.

Factual Background

On November 2, 2015, the BoT commenced a rulemaking proceeding by publishing a Request for Comments in the *State Register.* The rulemaking was titled "Possible Amendment to Rules Governing Issuance, Renewal and Validity of Teaching Licenses, Minnesota Rules, 8710.0300-8710.0500," and was identified as Revisor's ID Number 4369 (R4369 Rule).[9] According to the Request for Comments, the proceeding involved the BoT's possible adoption of rule amendments that would:

> permit applicants to demonstrate their qualifications for teaching licensure through recognition of a teaching license from another state in a similar licensure area, completion of a state-approved teacher preparation program, and teaching experience as the teacher of record in a similar licensure field, as well as amendments to provide additional clarification to the existing rules pertaining to all licensing requirements.[10]

The public was invited to submit comments by January 1, 2016, although the BoT had not yet drafted any proposed rule language for the public's review and consideration.[11]

In March 2016, the Office of the Legislative Auditor released a report critical of the state's teacher licensure system as implemented by the BoT and the Minnesota Department of Education.[12] In response to the report, the 2016 Legislature appointed a study group to make recommendations for restructuring and consolidating all teacher licensure activities into a single state agency.[13]

Upon review of the study group's recommendations, the 2017 Legislature effectively dissolved the BoT, created the PELSB and enacted a complete overhaul of the state's teacher licensure system, including a detailed restructure of license types and standards. Signed into law effective May 30, 2017, the legislation (2017 Legislation) encompassed 35 pages of revisions to over 59 separate statutory sections, most with individualized effective dates.[14] The relevant provisions are summarized below.

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[9] 40 Minn. Reg. 510 (November 2, 2015). The Chief Judge takes judicial notice of this publicly available document, and all other publicly available documents as cited throughout this Order, as authorized by Minn. R. 1400.8607, subp. 4 (2017).
[10] *Id.*
[11] *Id.*
[12] Minn. Office of the Legis. Auditor, *Minnesota Teacher Licensure* (Mar. 2016).
[13] 2015 Minn. Laws 189, art. 24, sec. 24.
[14] 2017 Minn. Laws 1st Spec. Sess. 5, art. 3, 12.

Legislative directive	Effective Date	Citation
PELSB created; no rulemaking authority provided	September 1, 2017	Art. 12, Sec. 2
BoT amended out of existence and all authority transferred to PELSB	January 1, 2018	Art. 12, Sec. 1[15] Art. 12, Sec. 20
PELSB given authority and directive to adopt specified rules[16]	January 1, 2018	Art. 3, Sec. 1 Art. 12, Sec. 11 Art. 12, Sec. 20
PELSB directed to issue licenses	July 1, 2018	Art. 3, Secs. 3-5 Art. 3, Sec. 9 Art. 12, Sec. 7

In July 2017, the BoT began working with the Revisor's Office to draft rules in response to the 2017 Legislation.[17] The PELSB understood that its rules would need to be finalized and approved by July 1, 2018 so it could then begin issuing the licenses identified by the 2017 Legislature.[18] With the approval of the Revisor's Office,[19] the BoT utilized the rulemaking proceeding it had commenced in its 2015 published Request for Comments with respect to the R4369 Rule. Through its existing Standards and Rules Committee, the BoT met with various stakeholder groups to review and seek input on several iterations of the draft rule throughout the summer and fall of 2017.[20]

As directed by the 2017 Legislation, Governor Dayton appointed the initial members of the PELSB, effective September 12, 2017.[21] The PELSB met for its first transition meeting on October 12, 2017.[22] Thereafter, some members of the newly

[15] In an amendment to the definitional section of the statute, found at Minn. Stat. § 122A.06, the 2017 Legislation effectively dissolved the BoT by substituting the PELSB into each statutory reference to the BoT previously found in Chapter 122A.
[16] The 2017 Legislation also authorizes the PELSB to adopt rules on other specified topics, effective July 1, 2018. *See* 2017 Minn. Laws 1st Spec. Sess. 5, art. 3, secs. 5, 9; art. 12, sec. 14.
[17] Affidavit (Aff.) of Alex Liuzzi, at ¶ 6.
[18] 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, sec. 7.
[19] January 17, 2018 Memorandum prepared by Kevin Behr, Assistant Revisor, for the PELSB regarding "Rulemaking process," at 2 ("Due to the lengthy rulemaking process and the Legislature's extremely tight deadline under those circumstances, the decision is made to modify the Board of Teaching's open rule to accommodate PELSB's mandate. Decision is based on review of the situation with three attorneys in the Revisor's Office, including review of the plain language of the session law requiring new rules and the initial request for public comment published in November 2015.")
[20] Aff. of A. Liuzzi, at ¶ 7.
[21] Aff. of A. Liuzzi, at Ex. B.
[22] Aff. of A. Liuzzi, at Ex. C.

appointed PELSB attended some of the stakeholder meetings held by the BoT to discuss the continually revised RD4369 Rule proposal.[23]

Prior to the first meeting of the PELSB, on September 26, 2017, the BoT's Interim Director refiled[24] with the Office of Administrative Hearings a different rulemaking proceeding, this one related to Developmental and Adaptive Physical Education licensure and identified as Revisor's ID No. 4370 (DAPE Rule). Docketed as OAH File No. 80-9021-34712, the filing included a copy of the proposed rule, most of which addressed the licensure of DAPE teachers but which also included the repeal of Minn. R. 8710.0400 (Applicants Prepared Outside of Minnesota) and Minn. R. 8710.4300 (Dance and Theater Arts).[25] In disapproving the BoT's submitted Additional Notice Plan, the Administrative Law Judge questioned whether the BoT had continuing statutory authority to promulgate the proposed rule. The Administrative Law Judge's October 2, 2017 Order advised the BoT to consider the effect of the 2017 Legislation, noting that the BoT's filing lacked any:

> assessment of the impact of promulgating these rules at a time when the Board is about to lose its current rulemaking authority, receive new rulemaking authority, and when the legislature has required it to review all of its existing rules with a mandate to amend or repeal those not consistent with statutes that will become effective within months of the time of this rulemaking proceeding.[26]

In early December of 2017, the BoT proceeded to finalize its R4369 Rule draft, titled "Proposed Permanent Rules Relating to Issuance, Renewal and Validity of Teaching Licensure of Teachers with Out-of-State Credentials; and Technical Changes to Teaching Licenses.[27] On December 26, 2017, the BoT filed with the Office of Administrative Hearings a request for approval of its Additional Notice Plan for the R4369 Rule, pursuant to Minn. Stat. § 14.101. The filing also included a proposed Notice of Hearing titled from the BoT, a copy of the unpublished proposed R4369 Rule certified by the Office of the Revisor, and a copy of a SONAR titled by the PELSB. The

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[23] Aff. of A. Liuzzi, at ¶ 10.

[24] The BoT had commenced a rulemaking proceeding related to possible amendments to rules governing teacher licensure for Developmental and Adaptive Physical Education in the fall of 2015, filed as Revisor's ID No. 4370. *See* 40 Minn. Reg. 509 (November 2, 2015). On April 1, 2016, the BoT filed the DAPE rulemaking proceeding with the Office of Administrative Hearings, where it was docketed as File No. 9021-33386. The BoT took no further public action on the DAPE rulemaking matter until it was refiled with the Office of Administrative Hearings in September 2017.

[25] *In the Matter of the Proposed Rules of the Board of Teaching Governing Developmental and Adapted Physical Education and Technical Changes*, No. 80-9021-34712, ORDER ON REVIEW OF ADDITIONAL NOTICE PLAN (Minn. Office Admin. Hearings, Oct. 2, 2017), accessible at https://www.revisor.mn.gov/state_register/?vol=40&num=18.

[26] *Id.*, at n. 6.

[27] See "Proposed Permanent Rules Relating to Issuance, Renewal, and Validity of Teaching 1.3 Licenses; Licensure of Teachers with Out-of-State Credentials; and Technical Changes 1.4 to Teaching Licenses" (December 7, 2017), accessible at https://mn.gov/pelsb/board/rulemaking/.

SONAR identified the authority for the rule proceeding as Minn. Stat. § 122A.09, subd. 9(a) and (b) (2016).[28]

The filings were docketed as OAH Docket No. 68-9021-33387, Revisors ID No. R4369. On December 29, 2017, Administrative Law Judge Jeanne M. Cochran approved the BoT's Notice of Hearing and Additional Notice Plan.[29]

On January 1, 2018, the BoT was effectively dissolved and lost all legal authority to act.[30] On that same date, the PELSB's authority and mandate to adopt rules consistent with the 2017 Legislation became effective.[31]

The PELSB met for the first time on January 2, 2018. It elected officers, including Board Chair Anne Krafthefer, and appointed as Interim Executive Director the individual who had been serving in that role for the BoT, pending the results of a hiring process. The PELSB took no recorded action with regard to the R4369 Rule.[32]

On January 8, 2018, the PELSB published the proposed R4369 Rule in the *State Register*.[33] At a PELSB meeting on January 12, 2018, members of the public, including Senator Eric Pratt, questioned whether the PELSB had properly instituted rulemaking for the R4369 Rule given that foundational actions were taken by the BoT prior to the PELSB's having legal authority to act.[34]

In a filing received by the Office of Administrative Hearings on January 22, 2018, Chair Krafthefer requested[35] "an opinion"[36] on two questions:

1. Can the Professional Educator Licensing and Standards Board proceed with rulemaking for Tiered Licensure (Minn. Stat. 122A.181-.184) started under the authority of the Board of Teaching?

2. Can two rulemaking efforts directed at amending and/or repealing the same Minnesota rules run concurrently."[37]

The Chair noted that the PELSB had already been assured in a written opinion issued by the Revisor's Office that its actions were "not only legally sound, but the only path to completing rulemaking prior to the July 1, 2018 deadline."[38]

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[28] SONAR, at 1.
[29] ORDER ON REVIEW OF ADDITIONAL NOTICE PLAN AND NOTICE OF HEARING (December 29, 2017).
[30] 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, § 20.
[31] 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, § 11.
[32] PELSB Minutes (January 2, 2018), accessible at https://mn.gov/pelsb/assets/Board%20minutes%201.2.18%20FINAL_tcm1113-323873.pdf.
[33] 42 Minn. Reg. 763 (January 8, 2018).
[34] Aff. of A. Liuzzi, at ¶ 17.
[35] The Office of Administrative Hearings does not consider "requests" related to legal issues; it issues decisions related to filed motions. *See* Minn. R. 1400.6600 (2017).
[36] Correspondence from PELSB Chair Krafthefter to Administrative Law Judge Jeanne Cochran (undated; received January 22, 2018).
[37] Given the legal conclusions reached in this Order with respect to the first question posed by Chair Krafthefer, the Chief Judge does not reach the second question.

In response to the PELSB's filing, on January 25, 2018 the Chief Administrative Law Judge issued an Order Regarding Motion for Jurisdictional Determination. The Order directed the PELSB to file a memorandum of law identifying all applicable legal authority for its positions. The Order further directed the PELSB to make its submissions publicly available for comment, and noted that the public comment period would continue until 4:30 p.m. on February 16, 2018.[39] Due to the procedural posture of the matter at this point in time, no rebuttal comments were called for or allowed.

The PELSB met again on January 26, 2018. The published agenda for the meeting indicated that the Board would "review [the] rulemaking process."[40] During the meeting, by motion the PELSB:

> ratif[ied] and adopt[ed] the Board of Teaching rulemaking process for Rule Draft 4369 on the matter of proposed rules relating to issuance, renewal, and validity of all licenses, given that stakeholders have and continue to fully and meaningfully participate in the process, and the Professional Educator Licensing and Standards Board members have the opportunity to engage in the process and revise any portion of the draft prior to adoption.[41]

On February 1, 2018, the Office of Administrative Hearings received the Professional Educator Licensing and Standards Board's Jurisdictional Submission. Within its ten pages of legal analysis, it contained the following seemingly contradictory statements: (1) "To the extent that the Court construed PELSB's January 18, 2018 letter as a motion, or as a request to file a motion, the Court may consider it withdrawn. PELSB does not believe any ruling is necessary at this time[;]"[42] and (2) "PELSB respectfully requests that the Chief Administrative Law Judge issue an order declaring that PELSB has the jurisdiction and authority to adopt the proposed rules, that any procedural defects are harmless errors, and that the rulemaking hearing may proceed as scheduled."[43]

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[38] *Id.;* January 17, 2018 Memorandum prepared by Kevin Behr, Assistant Revisor, for the PELSB regarding "Rulemaking process."

[39] As of the close of the public comment period, 21 individuals had filed comments in response to the issued Order Regarding Motion for Jurisdictional Determination. Nine of the commenters addressed the procedural matters currently at issue; the remaining 12 commenters raised substantive concerns with the proposed rules but did not express views related to the procedural issues at hand. All comments will be forwarded to the PELSB for consideration in the underlying rulemaking proceeding.

[40] PELSB Agenda (January 26, 2018), accessible at https://mn.gov/pelsb/assets/PELSB%20Meeting%20Agenda%201.26.18_tcm1113-323880.pdf.

[41] Aff. of A. Liuzzi, at ¶ 18.

[42] PELSB Jurisdictional Submission, at 1.

[43] *Id.*, at 10.

Legal Analysis

I. Legal Authority to Issue Ruling

In applying the Act, the Chief Administrative Law Judge has the authority to issue rulings on objections and motions in rulemaking proceedings involving public hearings.[44] While this authority is most often exercised in the context of an actual rulemaking hearing and not prior thereto, the Act clearly identifies the judge's duty to ensure that the agency has "documented its statutory authority to take the proposed action."[45] Supporting regulations authorize the judge "to do all things necessary and proper to conduct the hearing and to promote justice, fairness, and economy." Upon these authorities and given the legal issues presented in this matter, and considering the time sensitive nature of both the rulemaking proceeding and the PELSB's timeframe for taking any necessary corrective actions, the Chief Administrative Law Judge concludes that the PELSB's motion for a legal determination is properly presented for determination.

Like its sister courts in the Judicial Branch, this administrative court does not issue advisory opinions.[46] Nor does it, by now addressing the legal issues presented below, seek to function as "a junior-varsity legislature" or "the legal counsel or the research division" of the PELSB.[47] To the contrary, the Minnesota Administrative Procedures Act directs an administrative law judge to "review the hearing record and [to] disapprove the rule if the judge makes any of the findings in part 1400.2100, items A to G."[48] Part A of Minn. R. 1400.2100 (2017) requires the Chief Judge to disapprove a rule that is adopted in violation of the Act's procedural requirements, unless the noncompliance constitutes harmless error. Because the legal determinations below rest upon the hearing record as it exists to date, reflecting actions taken or not taken as part of the proposed rulemaking process to this point in time, the issues are ripe for determination even prior to the scheduled hearing in this matter.

II. Procedural Deficiency

The PELSB argues that the Chief Administrative Law Judge should find its rulemaking proceeding procedurally compliant and allow it to continue the rulemaking begun by the BoT for the following reasons: (1) the PELSB has the current authority to adopt the rule no matter that the rule language was drafted by the BoT; (2) to the extent that the BoT noticed the actual hearing and filed the SONAR these "procedural irregularities" are not prejudicial and should be ignored; (3) the fact that the BoT issued the "notice and scheduled the hearing" is immaterial in that the PELSB has "ratified" those actions. The PELSB maintains that it has, or will, perform "the key procedural requirements of the Administrative Procedures Act" and that any irregularities in the

[44] *See* Minn. R. 1400.2210, subp. 8 (2017).
[45] Minn. Stat. § 14.50.
[46] *See Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989); *Herrly v. Walser Buick, Inc.*, 47 WCD 670, 675 (W.C.C.A. 1992).
[47] See *In re Guardianship of Tschumy*, 853 N.W.2d 728, 756 (Minn. 2014) (Stras, J., dissenting).
[48] Minn. R. 1400.2240, subp. 2 (2017).

process constitute harmless error such that its rulemaking process should be found compliant and allowed to proceed.[49]

The PELSB is correct that a state agency may adopt rules that were drafted by others. It is also correct that the BoT's scheduling of the hearing and its filing of required documents in December 2017 do not mandate a finding of procedural irregularity in that those filings have not yet become foundational to any required step in the process. However, the PELSB is incorrect in its assertion that it could legally adopt the BoT's 2015 publication of the Request for Comments related to the 2015 version of the R4369 Rule. For the reasons addressed below, the PELSB's inability to ratify this procedural requirement, and its failure to complete this required step on its own, mandates a determination of procedural deficiency at this point in the proceeding.

A. The PELSB Missed a Step: Publishing a Request for Comments.

Rulemaking is a statutorily regulated process. As a state agency, the PELSB must strictly follow all necessary provisions of the Minnesota Administrative Procedures Act in order to create a valid rule.[50] "Rules can only be adopted in accordance with specific notice and comment procedures established by statute; failure to comply with all necessary procedures results in invalidity of the rule."[51]

In this case, the PELSB accomplished the first required step – obtaining statutory authority to adopt rules – on January 1, 2018. Pursuant to the 2017 Legislation, both the PELSB's authority to act and its rulemaking authority came into being on that date.[52] The 2017 Legislation specified that the PELSB "must adopt rules only under the specific statutory authority,"[53] which is consistent with the Act's requirement that agency rulemaking authority is specifically limited as the legislature directs.[54]

The next required step in the statutory rulemaking process is the publication of a Request for Comments. The Act requires that the Request for Comments be published "within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended or repealed."[55] The Act further requires that the Request for

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[49] PELSB Jurisdictional Submissions, at 5-9.
[50] *Minnesota Envtl. Sci. & Econ. Review Bd. v. Minnesota Pollution Control Agency*, 870 N.W.2d 97, 99 (Minn. Ct. App. 2015).
[51] *White Bear Lake Care Ctr., Inc. v. Minnesota Dept. of Pub. Welfare*, 319 N.W.2d 7, 9 (Minn. 1982) *citing Johnson Brothers Wholesale Liquor Co. v. Novak*, 295 N.W.2d 238 (Minn. 1980). *See also Cable Communications Bd. v. Nor-W. Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) ("[*A*]*ll* rules are subject to the rulemaking requirements of MAPA.") *See also Contested Case of Ebenezer Soc. v. Minnesota Dept. of Human Services*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988).
[52] 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, § 11.
[53] *Id.*, now codified at Minn. Stat. § 122A.09, subd. 9(f).
[54] *See* Minn. Stat. § 14.05, subd. 1 ("Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations").
[55] Minn. Stat. § 14.101, subd. 1.

Comments be published at least 60 days before publication of a notice of hearing,[56] unless the Chief Administrative Law Judge reduces that time period to 30 days.[57]

The record to date in the present matter indicates that the PELSB has not yet published a Request for Comments. The 60-day timeframe for doing so expires on March 2, 2018, which is 60 days after January 1st – the date the PELSB obtained legal authority to adopt rules.[58] Until it does so, the PELSB's rulemaking proceeding is noncompliant with the procedures established by the Act.

In an attempt to avoid this result, the PELSB makes two arguments. First, it asserts that it lawfully ratified and adopted the BoT's 2015 publication of a Request for Comments and thereby made the BoT's actions its own. Second, the PELSB argues that any failure on its part to complete a required step in the process constitutes harmless error, which should be disregarded. As set forth below, the PELSB is incorrect on both counts.

B. The BoT's Rulemaking Processes Died With the BoT.

On October 9, 2015, the BoT authorized its staff to initiate a new rulemaking proceeding related to the legislature's direction found at 2015 Minn. Laws 1st Spec. Sess. 3, art. 2, sec. 9, later codified at Minn. Stat. § 122A.09, subd. 4(o). The new Subdivision 4(o) required the BoT to adopt rules, by January 1, 2016, "to license applicants under sections 122A.23 and 122A.256 permitting applicants to demonstrate their qualifications through the board's recognition of a teaching license from another state and criteria for determining a 'similar content field' and 'similar licensure area.'"[59] On November 2, 2015, the BoT published its Request for Comments in the *State Register* for proposed rules titled "Possible Amendment to Rules Governing Issuance, Renewal and Validity of Teaching Licenses, Minnesota Rules, 8710.0300-8710.0500,"[60] but no rule draft was provided for the public's review.[61]

A Request for Comments is sufficient to commence a rulemaking proceeding under the Act if it includes "a description of the subject matter of the proposal and the

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[56] *Id.*
[57] Minn. Stat. § 14.101, subd. 4.
[58] *See* Minn. R. 1400.2030 (2017).
[59] Minnesota Board of Teaching Resolution adopted Oct. 9, 2015, accessible at https://mn.gov/pelsb/assets/Resolution%20Licensure%20Rulemaking%2010%2009%2015_tcm1113-320870.pdf.
[60] 40 Minn. Reg. 510 (November 2, 2015).
[61] Because no draft of the rules was published or available for public review in November 2015, the record does not reveal what specific rule amendments were contemplated by the BoT in its 2015 rulemaking proceeding. The record does reveal that what was contemplated in the 2015 rulemaking was not the tiered licensure system now being proposed by the PELSB. The concept and design of the tiered licensure system did not arise until the publication of the 2016 study group's recommendation, and so could not have been included within the scope of the proceeding commenced a year earlier by the BoT. As such, the question arises as to whether the Request for Comments published in the BoT's 2015 rulemaking proceeding constituted a "substantially different" rule than that which is now proposed by the PELSB. *See* Minn. Stat. §§ 14.05, subd. 2; 14.15, subd. 3.

types of groups and individuals likely to be affected."[62] The Request for Comments published by the BoT in 2015 met this low threshold, and thereby effectively commenced the BoT's 2015 rulemaking process.

Even so, the 2015 BoT rulemaking process cannot be engrafted into the current PELSB proceeding. The two proceedings involved two separate state agencies; the 2017 Legislature did not merely rename the BoT – it dissolved that agency and created another, complete with the appointment of new decision-makers.[63] When it did so, the 2017 Legislature also specified that the PELSB "must adopt rules only under the specific statutory authority,"[64] which negates any ability to adopt rules under other, pre-existing authority of the BoT.[65] The 2017 Legislation further directed the PELSB not to rely on the former BoT's rules, which would necessarily include pending rulemaking proceedings, in its mandate that the PELSB "review all rules adopted by the Board of Teaching and amend or repeal rules not consistent with statute."[66]

Once the 2015 rulemaking proceeding was null and void upon the dissolution of the BoT, the completed procedural steps that made up the 2015 proceeding could not legally be ratified and adopted by the PELSB, nearly a month later, on January 26, 2018. While it is highly questionable whether one state agency ever has the authority to "adopt" the actions of another as its own without specific statutory authority to do so, it is clear in the rulemaking context that one agency cannot, on its own, delegate rulemaking functions to another entity.[67] Correspondingly, the legal concept of ratification requires "that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made.*"[68] The PELSB had no legal authority to commence rulemaking in 2015, so it had no legal ability in 2018 to ratify the BoT's 2015 actions in an attempt to make that action its own.

C. The Transfer Statute Does Not Save the Day.

The Office of the Revisor's legal opinion reaches the opposite result. Citing Minn. Stat. § 15.039 (2016), the legal staff of the Revisor's Office opines that "it is clear PELSB is a continuation of the Board of Teaching" and so all of the BoT's former authority, including rulemaking, transferred to the PELSB as a matter of law. Accordingly, the Revisor's Office asserts that the PELSB's reliance on the BoT's earlier

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[62] Minn. Stat. § 14.101, subd. 1

[63] 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, secs. 1, 20, 21.

[64] *Id.*, now codified at Minn. Stat. § 122A.09, subd. 9(f).

[65] *See* Minn. Stat. § 14.05, subd. 1 ("Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations").

[66] 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, § 20 (d).

[67] *See* Minn. Stat. § 14.05, subd. 1; 14.50; Minn. R. 1400.2100, item F.

[68] *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 98, 115 S. Ct. 537, 543 (1994) (emphasis in original). *See also Losinski v. Am. Dry Cleaning Co.*, 281 N.W.2d 884, 887 (Minn. 1979) ("Where, however, it is necessary that authority to do a particular act or enter into a particular contract be given in a certain form or mode in the first instance, either by reason of mandatory charter or statutory provision, or by reason of a common-law rule, ratification of such act or contract must follow the prescribed form or mode.")

published Request for Comments is allowable or, in the worst instance, harmless error.[69]

The Chief Administrative Law Judge disagrees. While the Revisor's Office is accurate in setting forth the typical operation of Minn. Stat. § 15.039, this is not a typical case.

The Revisor's Office is correct that section 15.039 addresses the effects of transfers of authority between state agencies. It is also correct that the statute sets out the general rule that, upon transfer, the authority of the existing agency moves to and becomes part of the new agency, including all current rulemaking authority.[70] Applying this general rule in the three matters cited by the Revisor's Office, the subject transfers were found to be complete and the identified legal authorities to be continuous.[71]

These cases are not authoritative with regard to the present matter. In each of these cases, the transfer statutes contained no specific language directing a result different than the general rule.[72] Section 15.039 provides that the general rule applies only "unless the act directing the transfer provides otherwise."[73]

The 2017 Legislation did provide otherwise. It directed the PELSB to adopt rules directed at specific content – the tiered licensure system – and it repealed the BoT's rules and the rulemaking authority on which they were built.[74] Prior to the 2017 Legislative Session, the BoT had authority to adopt licensure rules only as provided in Subdivision 4 of Section 122A.09.[75] None of the 15 subparts of that subdivision contained any reference to the tiered licensure system as eventually defined in the 2017 Legislation. As the BoT never had rulemaking authority specific to the tiered licensure

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[69] January 17, 2018 Memorandum prepared by Kevin Behr, Assistant Revisor, for the PELSB regarding "Rulemaking process."

[70] Minn. Stat. §15.039, subd. 3.

[71] *See Rockford Township v. City of Rockford*, 608 N.W.2d 903, 906 (Minn. Ct. App. 2000) (transfer of Minnesota Municipal Board authority to the Department of Administration's Office of Strategic and Long-Range Planning); *In the Matter of the Residential Building Contractor's License of Dean R. Johnson Construction Inc.*, License No. 1609, 2009 WL 314196 (Minn. Off. Admin. Hrgs., January 14, 2009) (transfer of authority to regulate residential building contractors from Department of Commerce to Department of Labor and Industry); *In the Matter of Proposed Adoption of the Rules of the State of Minnesota, the State Board of Technical Colleges, General Studies and General Education, Minn. Rules Part 3700.1200 To 3700.1280*, 1994 WL 929552, (Minn. Off. Admin. Hrgs., January 12, 1994) (rules relating to post-secondary and adult vocational education transferred from the State Board of Education to a new State Board of Vocational Technical Education).

[72] *See Rockford Township, 608 N.W.2d at 906*; *In the Matter of the Residential Building Contractor's License,* 2009 WL 314196, at *8-9, n. 70; *In the Matter of Proposed Adoption of the Rules of … the State Board of Technical Colleges,* 1994 WL 929552, at *5.

[73] Minn. Stat. §15.039, subd. 1.

[74] 2017 Minn. Laws 1st Spec. Sess. 5, art. 3, sec. 1; art. 12, secs. 1, 11, 20.

[75] Minn. Stat. §122A.09, subd. 4 (2016) (prior to 2017 amendments).

system, no such authority could have transferred to the PELSB pursuant to Minn. Stat. § 15.039.[76]

D. Failing to Request Public Comments is Not Harmless Error.

Perhaps predicting this result, the PELSB argues that the Chief Administrative Law Judge should ignore the "procedural irregularities" in its rulemaking process by finding them to constitute harmless error. In relevant part, the Act provides as follows:

> The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds:
>
> (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or
>
> (2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.[77]

Relying on this authority, the Office of Administrative Hearings has found procedural errors in rulemaking proceedings to be harmless when the error itself, or the agency's affirmative corrective action, ensured that no person was prevented from meaningfully participating in the rulemaking process.[78] In each instance, the agency had

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[76] The 2017 Legislation also repealed Minn. Stat. § 122A.09, subd. 4(o), the authority on which the BoT acted to publish its Request for Comments in the 2015 rulemaking. See 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, § 7. "If a law authorizing rules is repealed, the rules adopted pursuant to that law are automatically repealed on the effective date of the law's repeal unless there is another law authorizing the rules. Minn. Stat. §14.05, subd. 1.

[77] Minn. Stat. § 14.15, subd. 5.

[78] *See In re the Proposed Expedited Permanent Rules of the Bd. Of Barber Exam'rs Relating to Barger Regulation,* No. 68-9034-34352, 2017 WL 4325095 at *1 (Minn. Office Admin. Hearings, Sept. 19, 2017) (agency failed to include in the provided notice that it had the ability to modify the rules if the modifications did not make the rule substantially different, but error held to be harmless because agency made no modifications to the proposed rules); *In re the Proposed Exempt Rules of the Dep't of Nat. Res. Relating to Display of Paddle Bd. Licenses*, No. 80-2005-31904, ORDER ON REVIEW OF RULES UNDER MINN. STAT. §§ 14.388, 14.386, AND MINN. R. 1400.2400 (Minn. Office Admin. Hearings, Nov. 12, 2014) (agency published inconsistent information regarding the close of the comment period but took corrective action after learning of its error and subsequently received comments from the public); *In re the Permanent Rules on Teacher Educ. Programs, Student Teaching, Field Experience and Technical Changes, Minn. Rules Parts 8700, 8705 and 8710*, No. 08-1302-30331, REPORT OF THE ADMINISTRATIVE LAW JUDGE (Minn. Office Admin. Hearings, July 28, 2014) (late mailing; failure to include SONAR in mailing to legislators, legislative reference librarian, and legislative coordinating commission; notice of hearing omitted required components); *In re the Proposed Rules Governing Driver Information, Licensing, and Testing; Minn. Rules Chapter 7410*, No. 11-2400-22112-1, ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE (Minn. Office Admin. Hearings, Apr. 18, 2012) (agency published Request for Comments more than 60 days after obtaining the authority to commence rulemaking); *In re the Proposed Rule Governing Paraprofessional Credentialing, Minn. Rules Chapter 8710*, No. 8-1302-20053-1, REPORT OF THE ADMINISTRATIVE LAW JUDGE (Minn. Office Admin. Hearings, May 6, 2010) (failure to address whether proposed rules impose restrictions or have an impact on farming operations); *In re the Adoption of the Exempt Rules of the Dep't*

taken the required steps, albeit in less than perfect form, and the record evidenced the fact that meaningful participation was still available to the public at large.

That is not the case here. In the present matter, the PELSB skipped a statutory step entirely when it failed to publish a request for comments. The entire purpose of this requirement is to ensure that the public has an opportunity to meaningfully participate in the rulemaking process. By not formally requesting comments, the public was deprived of the right to make its wishes known.

The Act's mandate is clear: "an agency, at least 60 days before publication of a notice of intent to adopt or a notice of hearing, **shall** solicit comments from the public on the subject matter of a possible rulemaking proposal under active consideration within the agency by causing notice to be published in the State Register."[79] While the Act provides that a rule cannot be invalidated "on the grounds that the **contents** of this notice are insufficient or inaccurate" if the agency "made a good faith effort to comply with this section,"[80] that provision is inapplicable here. The contents of the notice are not at issue; the PELSB provided no such notice at all.

The PELSB argues that its predecessor agency made authentic and broad efforts to work with organizations representing education stakeholders, and that those efforts should be deemed a sufficient substitute for the required publication of the Request for Comments such that this instance of noncompliance should be deemed harmless error. Other courts have addressed this argument in the context of the harmless error provision of the federal Administrative Procedures Act (APA):[81]

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of Pub. Safety Governing Drivers' Licenses and Vehicle Records; Proof of Identity and Residency; Minn. Rules, Chapter 7410, No. 77-2400-14935-1, SECOND ORDER AFTER REVIEW BY THE CHIEF JUDGE UNDER MINN. STAT. § 14.388, SUB. 5 (Minn. Office Admin. Hearings, July 12, 2001) (failure to obtain the approval of the Chief Administrative Law Judge prior to filing the rules with the Secretary of State and publishing them in the *State Register*); *In re the Review of Adopted Permanent Rules of the Minn. Emergency Servs. Regulatory Bd. Relating to Ambulance Servs., Minn. Rules, Part 4690.3800*, No. 76-0913-14227-1, LETTER (Minn. Office Admin. Hearings, Apr. 4, 2001) (SONAR did not include a list of witnesses and a description of the expected witness testimony and agency failed to provide the required Certificate of Providing Additional Notice); *In re Review of Adopted Permanent Rules of the Dep't of Agric. Relating to Cheese and Cheese Products, Minn. Rules, Chapter 1535*, No. 76-0400-14126-1, LETTER (Minn. Office Admin. Hearings, Feb. 13, 2001) (SONAR lacked a citation to agency's statutory authority to adopt the rule); *In re the Review of Adopted Permanent Rules of the Bd. of Chiropractic Exam'rs Relating to Graduate Preceptorship Program, Minn. Rules, Parts 2500.0100 and 2500.2500 to 2500.2525*, No. 77-0901-13120-1, LETTER (Minn. Office Admin. Hearings, Aug. 17, 2000) (provided 25 days for public comment rather than 30 as required); *Review of Adopted Permanent Rules of the Bd. Of Teaching Relating to Continuing or Professional Teacher License Issuance and Renewal, Minn. Rules, Chapters 8700, 8710, and 8750*, No. 06-1302-12654-1, LETTER (Minn. Office Admin. Hearings, Aug. 10, 2000) (agency complied with requirement to send notice to legislators, but failed to attach a copy of the SONAR as required); *In re the Proposed Rules Governing the Competitive Provision of Local Telecomms. Servs., Minn. Rules, parts 7812.0050 through 7812.2300*, No. 06-2500-10930-1, REPORT OF THE ADMINISTRATIVE LAW JUDGE (Minn. Office Admin. Hearings, May 8, 1997) (failure to file all documents with the Office of Administrative Hearings prior to the hearing).

[79] Minn. Stat. § 14.101. subd. 1 (emphasis added).

[80] Minn. Stat. § 14.101, subd. 3 (emphasis added).

[81] 5 U.S.C. § 706(F).

> [W]e must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context. An agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary. Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures. To avoid gutting the APA's procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result. We have held that the failure to provide notice and comment is harmless only where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached.[82]

In its insistence on a finding of harmless error under the Minnesota Administrative Procedures Act, again the PELSB seeks to make the work of the BoT its own. Again, that effort fails for the reasons cited above.

Even if that work had been done under the authority of the PELSB following its legislative creation, reaching out to and receiving input from stakeholders through meetings of the BoT's Standards and Rule Committee does not negate the consequences of failing to provide notice to the general public. The Act does not allow an agency to make ad hoc determinations of who has a sufficient interest such that they should receive notice; the Act requires that the entire public receive notice through the *State Register*. Whether they are parents with children in the state's schools, or individual teachers with specific views on the value the state should place on their education or experience, or random persons with thoughts about how their state should best license educators – the public has a statutory right to be notified about an agency's rulemaking in order to have an opportunity to share their views with their government directly. Failing to provide that right violates the notice and comment requirements of the Act. As "rules adopted without compliance with [the] notice and comment procedures established by Minn. Stat. §§ 14.14–.20 are invalid,"[83] the Chief Judge has no authority to shield this statutory noncompliance by labeling it as mere harmless error.[84]

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[82] *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) *quoting Sagebrush Rebellion, Inc. v. Hodel,* 790 F.2d 760, 764–65 (9th Cir.1986) (*in turn quoting Braniff Airways v. CAB,* 379 F.2d 453, 461 (D.C.Cir.1967)) (other citations omitted); *see also California Wilderness Coal. v. U.S. Dept. of Energy,* 631 F.3d 1072, 1090–95 (9th Cir. 2011)*; United States v. Reynolds*, 710 F.3d 498, 514–15 (3d Cir. 2013); *United States v. Johnson,* 632 F.3d 912, 930-32 (5th Cir. 2011); *United States v. Utesch,* 596 F.3d 302, 312–13 (6th Cir. 2010).

[83] *Contested Case of Ebenezer Soc. v. Minnesota Dept. of Human Services*, 433 N.W.2d 436, 439 (Minn. Ct. App. 1988); *Application of Orr*, 396 N.W.2d 657, 663 (Minn. Ct. App. 1986) *citing White Bear Lake Care Center v. Minn. Dept. of Public Welfare,* 319 N.W.2d 7, 9 (Minn.1982).

[84] *See Shinseki v. Sanders*, 556 U.S. 396, 406–08, 129 S. Ct. 1696, 1704–05 (2009) (In administrative rulemaking, statutory error should only be deemed to be harmless "when errors do not affect the substantial rights of the parties or the public in the particular circumstances at issue.")

Opportunity for Cure

Minnesota's Administrative Procedures Act requires the Chief Judge to assist an agency in determining what changes or actions are necessary to obtain approval of a noncompliant rule process.[85] Mindful of the importance of this proceeding and the significant investment of public resources already devoted to this matter, the Chief Judge presents the following suggestions that could enable the PELSB to bring this rulemaking proceeding into procedural compliance.

A. Legislative Assistance

The PELSB desires to complete the rulemaking proceeding by July 1, 2018, both to comply with the 2017 Legislation's apparent directive[86] and to ensure that educators are properly licensed for the 2018-2019 school year.[87] If the PELSB determines that this timeframe is unattainable, it has the option of seeking legislative amendment to obtain additional time or to seek authority to proceed under the often faster expedited rulemaking process.[88]

B. Stay the Course; Meet the Deadlines

If the PELSB instead chooses to continue with its existing rulemaking proceeding, it may be able to cure the current procedural issues by completing the following steps within the narrowly defined timeframes.

1. The PELSB would publish a Request for Comments in the *State Register* by Monday, February 26, 2018, notifying the public that it has 30 days[89] in which to submit comments to the proposed rules. February 26th is the last publication date available before expiration of the 60-day period required by Minn. Stat. § 14.101. To meet the *State Register's* publication deadline, the Request for Comments should be provided to the *State Register* by **noon on Tuesday, February 20, 2018**. Given the intervening state holiday between the date of this Order and the identified publication deadline, the PELSB is urged to contact the editor of the *State Register* as necessary to negotiate a specific publication deadline.[90]

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[85] Minn. R. 1400.2240, subp. 4 (2017).

[86] The 2017 Legislation provides that the PELSB shall commence issuance of licenses on July 1, 2018, and the PELSB understands this directive to mandate that the rulemaking should be completed by that date. Notwithstanding this understanding, the Chief Judge notes that the 2017 Legislation does not directly specify a termination date for the rulemaking proceeding. Minn. Stat. § 14.125 provides a general rule that agencies are allowed 18 months from the date of their receipt of rulemaking authority to publish a notice of hearing or notice of intent to adopt rules.

[87] Aff. of A. Liuzzi, at ¶ 19.

[88] See Minn. Stat. § 14.389. The PELSB is cautioned to consider that, even under the expedited process, a public hearing is required if 100 or more people submit a written request for such. Minn. Stat. § 14.389, subd. 5.

[89] Pursuant to Minn. Stat. § 14.101, subd. 4, the Chief Judge has ordered the comment period reduced from 60 to 30 days, for good cause shown.

[90] See Printing Schedule and Submission Deadlines published in every volume of the *State Register*, available at https://mn.gov/admin/bookstore/register.jsp.

2. Thirty days later following the expiration of the comment period, **on March 28, 2018**, the PELSB would publish a Notice of Hearing identifying new dates and times for the scheduled hearing between April 30th and May 4th.[91]

3. The PELSB would **hold the hearing** on the date(s) noticed **between April 30, 2018 and May 4, 2018**, inclusive.

4. Assuming the hearing record closes no later than May 4, 2018, the administrative law judge will order a 10-day **post-hearing comment period ending on May 14, 2018** or, if 20 days is necessary, ending on May 24, 2018.

5. Starting no later than May 24, 2018, the administrative law judge will take up to 30 days to write a report on the rule. Without any granted extension, the **rule report** will be **completed on or before June 24, 2018**.

6. If necessary, the **chief administrative law judge** will review the report and hearing record and prepare a **report** within the shortest timeframe possible, **by no later than June 29, 2018**.

7. If the rule is approved, the PELSB will **adopt the rule and publish a notice** of the rule's adoption in the *State Register.* **on or before July 2, 2018.**[92]

Obviously, time is of the essence. The Office of Administrative Hearings stands ready to provide requested technical advice or assistance through its non-judicial rulemaking staff as necessary, as it does in all rulemaking proceedings filed with the agency. The Chief Judge recommends that the PELSB seek additional assistance from the state's Interagency Rules Committee and its published Rulemaking Manual.[93]

Conclusion

As a determination on issues of preliminary procedural noncompliance, this Order is not a final order in this rulemaking proceeding. The record of the proceeding remains open; a hearing in the matter is still anticipated.

Should the PELSB choose to disregard the determinations contained herein and proceed to hearing as presently scheduled on March 2, 2018, it will be allowed to do so.

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[91] Given the complexity of the proposed rule, the Chief Judge recommends that the PELSB schedule the hearing in this matter for more than one day to ensure that all stakeholders and other members of the public are allowed a meaningful opportunity to participate.

[92] Missing a July 1, 2018 end-date by one day due to the scheduled publication dates of the *State Register* would, under the authorities set out in notes 78 and 86 above, most likely constitute harmless error.

[93] See http://www.health.state.mn.us/rules/manual/2017manual.pdf.

While the Chief Judge has identified the legal determinations that flow from the record as it exists to date, it is the agency, and not the Office of Administrative Hearings, that is responsible for taking the actions necessary to comply with the Act's procedural requirements.[94] Following a noticed hearing in the matter, an assigned administrative law judge will issue a rule report determining whether the PELSB has "(i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant procedural requirements of law or rule, and (iii) … demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts."[95]

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[94] *Builders Ass'n of Twin Cities v. Minnesota Dept. of Labor & Indus.,* 872 N.W.2d 263, 274 (Minn. Ct. App. 2015) ("The statute clearly requires that the agency, not the ALJ, must make the determination. Respondent did not make such an analysis. Therefore, we conclude that, because respondent failed to do this, it did indeed violate rulemaking procedures. We are mindful today that we are declaring a rule adopted by an administrative agency of the state invalid. We do not do so lightly, but rather thoughtfully and unanimously. Nevertheless, we are bound to apply the law.").

[95] Minn. Stat. § 14.50.